**IN THE HIGH COURT OF DELHI AT NEW DELHI**

SUBJECT : SUIT FOR RECOVERY

Judgment Reserved on: 04.04.2011

Judgment Delivered on: 08.04.2011

RSA No.15/2007 & CM Nos. 576/2007, 577/2007, 3511/2007, 7222/2007, 15308/2008 & 15309/2008

INDIAN OIL CORPORATION LIMITED ……..Appellant
Through: Mr. Abhinav Vasisht, Sr. Advocate along with Mr. Raman Kumar, Advocate.

Versus

SHRI. SUBHASH CHANDER RISHI …. Respondent
Through: Mr. Arvind Dhingra, Advocate.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1. This appeal has impugned the judgment and decree dated 13.11.2006 which had endorsed the findings of the trial judge dated 02.08.2003 whereby the suit filed by the plaintiff Sh. Subhash Chander Rishi seeking recovery of possession and damages qua the suit property i.e. property comprising 678.25 sq ft, 27 Barakhamba Road, New Delhi- 110001 (hereinafter referred to as the suit premises) had been decreed.

2. The plaintiff had filed the present suit for possession and recovery of the aforenoted suit property of which he is admittedly the owner/landlord. The parties had entered into a lease agreement dated 12.08.1985 pursuant to which the aforenoted suit property had been leased out to the defendant.

3 Clause 4 of this document is relevant for the controversy in issue. It is reproduced hereunder:-

"4. IT IS HEREBY FURTHER AGREED BY AND BETWEEN THE PARTIES hereto that:

If the LESSEE shall continue in possession after expiry of the term hereby granted, the LESSOR will grant a fresh tenancy of the demised premises to the LESSEE for a further term of 3(three) years from the expiration of the term hereby granted upon the same terms and conditions except on a 20% (twenty per cent) increase in the rent, and so on in respect of each 3 (three) years term and meanwhile, the LESSEE shall be deemed to continue in possession under the fresh tenancy."

Vehement contention of the appellant is that in terms of Clause 4 of this lease deed, there was an automatic renewal of the tenancy by the plaintiff in favour of the defendant if the defendant continue to pay the increased and enhanced rent of 20% after every three years and since the defendant admittedly continued to pay this enhanced rent; defendant/lessee would be deemed to continue in possession under a fresh tenancy. Contention of the appellant being that if this rider was fulfilled by the appellant, the tenancy of the defendant would continue; he could not be evicted.

4. The suit had been decreed by the trial court on 02.08.2003. Thereafter, on an appeal preferred by the defendant, the matter had been remanded back to the trial court; decree had again followed on 11.08.2005. In appeal, the impugned judgment had endorsed the finding of the trial judge. This was vide judgment dated 13.11.2006. It is also not in dispute that the possession of the property has since been handed over to the plaintiff in April 2002.

5. Learned counsel for the appellant has drawn the attention of this court to a letter dated 03.11.2003. This was sent by the defendant to the plaintiff along with a cheque of Rs. 1,03,114/- (of which Rs. 98,564/- comprised of rent from January to April 2002 at the rate of Rs. 24.641/- per month and Rs. 4,550/- was paid towards court fee). The letter inter alia stated:-

" Should you agree to accept the amount in full and final satisfaction of the decree, you may encash the cheque, and we will treat the matter as closed. Should this be unacceptable, please return and do not encash the cheque, and we will consider ourself at liberty to file an appeal and/or take such further steps as we consider ourselves best advised in the circumstances."

Contention of the appellant is that this cheque has since admittedly been encashed on 20.12.2003; this was an offer which had been made by the

defendant to the plaintiff and he having accepted this offer/proposal of the defendant, the plaintiff cannot now go back on this stand. It is pointed out that this letter of 03.11.2003 has specifically stated that after this proposal which had tendered an amount at Rs. 1,03,114/- and if the same was unacceptable to the plaintiff, the same could be returned; the cheque should be encahsed only if this offer was acceptable to the plaintiff; plaintiff having encashed the cheque, it is clear that a contract has come into existence between the parties in terms of Section 8 of the Indian Contract Act, 1872; plaintiff had accepted the proposal/offer of the defendant; he could not now revert from this stand.

6. Section 8 of the Indian Contract Act, 1872 which is relevant to decide this issue is extracted here-in-under:-

"8. Acceptance by performing conditions, or receiving consideration-

Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal."

7. It is pointed out that the plaintiff by his conduct .i.e. by the encashment of the cheque signified his acceptance to the proposal contained in the letter dated 03.11.2003. Reliance is placed upon the judgment reported in (2006) 5 SCC 311 Bhagwati Prasad Pawan Kumar Vs. Union of India to substantiate this submission. It is pointed out that in this case also where the appellant has accepted the cheque of the respondent and encashed it, it amounted to an acceptance of the offer made by the respondent and in terms of Section 8, he could not take a different stand. It is further pointed out that on this date i.e. on the date when this letter was sent i.e. on 03.11.2003, there was no lis pending between the parties. The suit of the plaintiff had been decreed on 02.08.2003; an application under section 152 of the Code of Civil Procedure (hereinafter referred to as `CPC') for correction in the judgment had been filed only on 07.01.2004.

8. This argument of the learned counsel for the appellant is bereft of any force. The letter dated 03.11.2003 is an undisputed document. Along with this letter, a cheque of Rs. 1,03,114/- had been tendered. It is also not in dispute that this cheque had been encashed on 20.11.2003. It is also not in dispute that on 15.04.2005, the judgment and decree dated 02.08.2003 had been set aside and the suit had been remanded back to the trial judge. Even before the trial judge, it was never the case of the defendant that since he had tendered the rent in terms of his letter dated 03.11.2003, it amounted to a

final settlement between the parties and under the rigors of Section 8 of the Contract Act, 1872, the plaintiff having accepted this offer cannot now change his stand.

9 This argument now urged was never a part of the pleadings; it also could not be for the reason that this situation had arisen after the suit had been decreed on 02.08.2003. A plea not emanating from the pleadings cannot raise a substantial question of law. This has been reiterated by Hon'ble Supreme Court in (2001) 3 SCC 179 Santosh Hazari Vs. Purushottam Tiwari where it was held that a plea not emanating from the pleadings between the parties cannot be raised for the first time before the second appellate court; such a plea would not amount to a substantial question of law. The present case is a suit for possession. The suit had been decreed on 02.08.2003 and only thereafter this letter dated 03.11.2003 had been sent by the defendant to the plaintiff.

10 Section 8 of the Indian Contract Act, 1872 has no application to the controversy in issue. Reliance upon the judgment of Bhagwati Prasad (supra) is misplaced. In that case, there was a dispute between the Railways and the appellant, there was a specific offer made by the Railways containing a condition that if the appellant accepted the cheques and encashed them, it would amount to an acceptance of this offer of the Railways; this was the moot question in the suit pending between the parties. Reliance upon the aforenoted judgment is wholly misplaced.

11. The next argument urged by the learned counsel for the appellant is on the provisions of Section 53 (A) of the Transfer of Property Act (hereinafter referred to as 'TPA Act'). He has relied upon the unamended provision i.e. the provision as prevailing prior to the amendment of 2002. It is contended that Clause 4 of the lease deed dated 12.08.1985 had envisaged an automatic renewal; the defendant was paying the enhanced rent of 20 % which was being accepted by the plaintiff; defendant could not have been evicted; he was protected under the doctrine of part performance as contained in Section 53 (A) of the TPA. To advance this submission, reliance has been placed upon AIR 1950 SC 1 Maneklal Mansukhbai Vs. Hormusji Jamshedji Ginwalia & Sons. It is pointed out that in this case, the Apex court has held that that the defence of Section 53 (A) is available even to a person who has an agreement of lease in his favour even though the same is unregistered. The lease deed in the instant case although unregistered yet in view of the unamended provisions of Section 53 (A), the transferee having been put in

possession of the property by the transferor, is deemed to be in continuous possession and the transferor or any person claiming under him is debarred from seeking an eviction against the transferor.

12 The unamended provisions of Section 53 (A) are reproduced hereinunder:-

"53 (A) Part Performance- Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

And the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

And the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

13. The proposition as laid down in Manekla Mansukhbhai (supra) is not in dispute. The doctrine of part performance in view of the unamended provisions of Section 53 (A) is available even in the case of an unregistered document i.e. an unregistered agreement of lease.

14. This argument of the appellant is however meritless. The lease deed is dated 12.08.1985. Admittedly, it was an unregistered document. The terms and conditions of an unregistered document cannot be read in evidence. Clause 4 which has been heavily relied upon by the appellant cannot be read; this clause also does not create an interest in perpetuity in favour of the defendant. Renewal of a lease can even otherwise be effected only by a registered document;

15 What necessarily follows is that the tenancy between the parties had become a tenancy on a month to month basis. It is not a dispute that vide legal notice dated 17.08.1998 (Ex.PW-1 /2), the tenancy of the defendant had been validly terminated. There is also no objection qua this termination. The monthly tenancy of the defendant having been legally terminated, thereafter i..e after its termination w.e.f. 01.10.1998, the status of the defendant was that of an unauthorized occupant. Defence of part performance as contained in Section 53 (A) of the TPA was wholly unavailable.

16. It has lastly been urged that mesne profits granted in favour of the plaintiff at the rate of Rs. 36.33/- per annum is miscalculated. The last rent payable was at the rate of Rs. 32.34 per sq. ft; enhanced amount in the absence of evidence, could not have been granted. Reliance has been placed upon 81 (1999) DLT 114 Darshan Singh Kohli & Anr. Vs. Rockland Securities Ltd. to support his submission. It is stated that in this case also where the lease itself had envisaged an increase of 20%, damages were awarded at the increased rate of 20% only; damages at the rate of Rs. 36.33. per sq. ft per month is in excess.

17 This argument has also only to be noted and be rejected. Issue no. 2 had been framed on the damages/mesne profits and the rate at which they are to be awarded in favour of the plaintiff. PW 1 had deposed that the suit premises is situated in Cannaught place; prevailing rent was Rs. 130 to Rs. 140 per sq. ft. Last rent paid was Rs. 18,280/-. Letters written by the plaintiff to his banker asking him to stop receiving rent from the defendant at the enhanced rate are also on record. There was also no document available with the defendant that the plaintiff had received enhanced rent after August 1988. DW 1/1 which had been produced by DW 1 showing the list of tenanted premises acquired by the defendant in 1986 is also on record but it was not accompanied by any rent receipt to show the payment of rent at the aforenoted rates. DW 1 had been also not refuted the claim of the plaintiff on the quantum of mesne profits as made by him in his deposition. Ex. PW 1/19 was relied upon by the plaintiff to show that defendant had paid Rs. 36.33 per sq. ft. per month for flat no. 913. The suit property is flat no. 808. This had weighed in the mind of trial judge to award mesne profit at the rate of Rs. 36.33/-. This argument is thus bereft of force.

18 All these arguments urged before this court have been delved into.

19 Finding returned in the impugned judgment are as follows:-

"12. In the light of above background the present appeal has been filed thereby raising the plea that the impugned judgment is bad in law and it is contended that in view of the clause 4(i) of Lease Deed dated 12.8.1985 which is Ex. D1 there was an unconditional obligation on the part of the respondent to renew the lease for further period of three years each and that the lease stood automatically renewed on the same terms and conditions as those of original Lease Deed except for 20% increase in rent and further that Ld trial court failed to appreciate that the suit was barred under provisions of section 53(A) of the Transfer of Property Act.

13. It is further contended by the appellant that as the appellant had paid rent to respondent since 20.8.1997 @ 18,280/- which was the rent payable in terms of the said contract and that w.e.f. 20.8.2000 the appellant had further increased the rent by 20% and that the appellant continued in possession of the said premises and as such the appellant had duly performed and remained willing to perform all obligations on its part required to be performed under the contract of Transfer/lease and as such the appellant was entitled to protection afforded by section 53 A of Transfer of Property Act and as such the respondent was debarred from enforcing against the appellant any right with respect of the said premises other than the right expressly provided for in the lease.

14. The appellant further contended that the Ld. Trial Court erred in holding that the original Lease Deed was not registered and that in the absence of registered Deed, tenancy could at best be a monthly tenancy and as such tenancy could be terminated by service of notice as per provisions of section 107 and 111 of Transfer of Property Act and that there was no cause of action to file the suit against the appellant. It is further contended by the appellant that in the circumstances of the case alleged notice of the termination was nonest and consequently the possession of the appellant over the suit premises was authorized and the question of mesne profits or damages did not arise.

15. It is further contended by the appellant that Ld. Trial Court failed to appreciate that in any event, the appellant vide its covering letter dated 3.11.2003 had paid to the respondent a sum of `
103114/- towards rent / damages for the period from January 2002 to April 2002 with a pre condition that the said cheque was being sent to the respondent towards full and final settlement of the decree and be only

encashed if the respondent accepting it in full and final settlement and further that respondent had without any protest encashed the cheque.

16. It is further contended by the appellant that there was no evidence on record to justify that the suit premises could fetch the rent, similar to the mentioned in the document Ex. PW 1/9 and that witness of the appellant had filed a list Ex. DW 1/1 which is pertaining to around 26 flats and the rent being paid in respect thereof by the appellant's corporation and that Ld. Trial court ought to have awarded the rent prevalent in respect of these 26 flats.

17. On the other hand counsel for the respondent has been opposing the maintainability of the appeal and strongly argued that not a single point has been raised by the appellant on the basis of which the impugned judgment/decree could be set aside. It is further argued by counsel for the respondent that impugned /decree does not suffer from any illegality or infirmity.

18. I have heard arguments advanced at bar by Ld counsel for both the parties at length and perused the record as well as impugned judgment and also gone through the citations relied upon by counsel for the appellant which are not applicable to the facts and circumstances of the present appeal.

19. As regards the first point raised by the counsel for the appellant that there was no evidence before Trial court on the basis of which damages @ 36.33 per square feet can be awarded with respect to the tenancy premises is concerned. I am of the opinion that the counsel for the appellant is not justified in raising this point. In view of the testimony of the DW 1 Sh. B. Arun Kumar, Senior Administration Manager, as he has proved document which is Ex. DW 1/1 which is the list of flats and rent paid by the appellant to those flats owners situated in the same building. It is admitted by the appellant that the rent @ 32.34 per square feet is being paid by the appellant with respect to different other flats in the same building and there are also old tenancies. So the amount of damages @ ` 36.33 per square feet as determined by the Ld Trial court is not excessive and accordingly counsel for the appellant is not justified in raising this point.

20. As regards other point raised by counsel for the appellant regarding extension of tenancy for a further period of three years w.e.f. 20.08.1997 till 19.8.2000 is concerned I am of the opinion that the same is not tenable, in the light of admitted facts that no written document/lease deed was executed

between the parties. The appellant had only been increasing rent by 20% which the respondent had been accepting. It clearly shows in the absence of any written document that an oral tenancy on month to month basis was created between the parties and accordingly, respondent was justified in terminating the oral tenancy of the appellant qua the suit premises by way of notice dated 17.8.1998, copy of which has been proved as Ex. PW 1/2. I am accordingly of the opinion that Trial court has rightly come to the conclusion that after termination of oral tenancy of the appellant qua suit premises by the respondent, the occupation of the appellant over the demised premises had become unlawful and appellant was under an obligation to pay damages with respect to use and occupation of the said premises.

21. As regards the other point raised by counsel for the appellant regarding protection of section of 53 A of Transfer of Property Act is concerned same is not available to the appellant as the respondent being owner of the demised premises can terminate, the oral tenancy by service of the notice as per provision of section 107 and 111 of the Transfer of Property Act. Moreover, as already held the appellant had only increased the rent and had not done any other act. No letter or notice was issued by the appellant to the respondent to execute the Lease Deed in writing.

22. As regards the other point raised by Ld. Counsel for the appellant about acceptance of cheque of Rs. 103114/- by the respondent is concerned. I am of the opinion. In the circumstances of the case that the appellant ought not to have sent the said cheque as the matter was subjudice before Ld. Trial Court and further that the appellant cannot put a pre condition upon the respondent about encashment of the cheque. I accordingly do not find any weight in this point raised by the counsel for the appellant.

20 These findings are in no manner perverse. These are two concurrent findings of fact. In the absence of perversity, hands of this court are tied; being a second appellate court, it cannot interfere with the findings of fact unless and until they are perverse. No such perversity has been pointed out.

21 This is a second appeal. It has been admitted on 13.02.2009 and the following substantial questions of law had been formulated.
"1. What is the effect if a party accepts a cheque without protest or reservation, which cheque has been offered with a pre-condition that it is in full and final settlement of the decreetal amount?

2. Whether a finding of the trial court is erroneous while holding that the appellant ought not to have sent the cheque in question when the matter was sub-judiced before the trial court despite the fact that no proceedings were pending challenging or seeking review of the order dated 02.08.2003?

3. Whether the suit was barred under the provisions of Section 53 (A) of the Transfer of Property Act in the light of specific term and expression used in clause 4 (i) of the lease agreement dated 12.08.1985?

4. Whether the trial judge committed an error granting mesne profits more than what was stipulated in the lease deed for the purposes of renewal of the lease deed."

22 In view of the aforenoted discussion, the substantial questions of law are answered in favour of the respondent and against the appellant. Appeal as also the pending applications are dismissed.

Sd./-
INDERMEET KAUR,J

APRIL 08, 2011